Supreme Court, U.S.
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No. 99-1603

IN THE

Supreme Court of the United States

GENERAL PUBLIC UTILITIES CORP., *et al.*,

Petitioners,

v.

FRED N. ABRAMS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR ALL PERSONAL INJURY RESPONDENTS

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STATEMENT OF THE CASE

The case described and argued by Petitioners in their Petition for Writ of Certiorari misrepresents the case and facts presented to the Third Circuit Court of Appeals and the United States District Court for the Middle District of Pennsylvania. Respondents are nearly 2,000 plaintiffs who filed personal injury and loss of consortium claims arising out of the nuclear plant accident that occurred at Unit 2 at Three Mile Island ("TMI") on March 28, 1979. They filed their cases over the course of time ranging from 1985 to as late as March 15, 1996 in different courts, through multiple complaints. Their cases were instituted in state and federal courts in Mississippi, as well as in state and federal courts in Pennsylvania. Their cases were never considered for class action certification pursuant to Federal Rule of Civil Procedure 23. In fact, a motion for class certification of a TMI personal injury case that was instituted in 1979 (and which is unrelated to the present cases pending before the Court) was denied at the insistence of the instant Petitioners on the basis of their argument that individual questions predominated over the common questions. *See In re Three Mile Island Litigation*, 87 F.R.D. 433, 440-442 (M.D. Pa. 1980).

Respondents who filed cases before August 20, 1988 expected to litigate their claims in the various forums where they were filed. However, the Price-Anderson Act was amended in 1988, 42 U.S.C. §§ 2014(hh), 2210(n)(2) allowing for the transfer and removal of all cases involving the Three Mile Island accident to the United States District Court for the Middle District of Pennsylvania. *See In re TMI Litigation Cases Consolidated II*, 940 F.2d 832 (3d Cir. 1991), *cert. denied sub nom., Gumby v. General Public*

Utilities Corp., 503 U.S. 906 (1992) (sustaining retroactive creation of federal jurisdiction for "public liability actions"). Once the constitutionality of the 1988 Amendments was determined, the district court approved a stipulation of the parties to accomplish an "administrative" consolidation of the cases into a master docket. The approved stipulation provided in part as follows:

> 1. All actions and causes of action in the civil actions . . . shall be consolidated for *administrative purposes* in one civil action, being Civil Action No. 1:88-1452
>
> * * *
>
> 3. Nothing in paragraphs 1 or 2 of the Stipulation or the dismissals pursuant thereto shall be deemed to constitute or affect any waiver of any claim, defense or issue, including but not limited to the statute of limitations, choice of law and bifurcation or consolidation for trial of claims, defenses, issues, parties or proceedings. (emphasis added).

Accordingly, the parties stipulated that the cases would be consolidated for *administrative purposes* only. The stipulation did not say anything about consolidating discovery for all plaintiffs, consolidation as to certain or predominating issues (the stipulation does not even identify any issue that is common, let alone one that is predominating), or the intent to conduct a consolidated trial or pretrial proceedings that would be binding on all plaintiffs. The consolidation was limited in nature, with a reservation of rights that plainly provided *inter alia*, that "claims, defenses, issues, parties or proceedings" would not be affected by the consolidation.

Subsequent to the administrative consolidation of the cases, the district court solicited case management proposals from the parties. Respondents proposed that a group of bellwether-like, test-case plaintiffs be selected, whose cases would be fully litigated in the expectation that the results of the litigation of those cases could "yield a high level of predictive value to the parties and counsel thereby providing a framework for the resolution of the remaining claims without endless repetition of trials." Respondents did not propose that the results of the litigation of the selected bellwether plaintiffs would bind the thousands of remaining plaintiffs in the litigation. The point of Respondents' proposal was to provide a basis by which the parties and the district court could *possibly* assess the values for a cross-section of claims, and also provide a basis for determining what kind of framework might be suitable for resolving the claims of the remaining non-bellwether plaintiffs.

Respondents modeled their proposal after the bellwether approach adopted in another radiation exposure case, *Allen v. United States*, 588 F. Supp. 247 (D. Utah 1984), *reversed on other grounds*, 816 F.2d 1417 (10th Cir. 1987), *cert denied*, 484 U.S. 1004 (1988), and quoted the *Allen* court case management plan as follows:

> This action is a consolidation of the individual claims of the 1,192 named plaintiffs. This is not a class action. . . . The trial encompassed 24 of the claims in their entirety. Pursuant to the suggestion of the court, these cases were selected by plaintiffs' and defendant's counsel as "bellwether" cases. The effort was to provide a selection of "typical" cases which when decided and reviewed may provide a legal and factual

> pattern against which the remaining issues in the pending cases may be subsequently matched.

Allen, 588 F. Supp. at 258.

Respondents' proposal also relied upon other case management plans that utilized the bellwether approach, where the merits of the selected bellwether cases only were at issue. *See, e.g., Cimino v. Raymark Industries, Inc.*, 739 F. Supp. 328, 329-30 (E.D. Tex. 1990), *reversed and remanded in part*, 151 F.3d 297 (5th Cir. 1998). In fact, one of Respondents' counsel had successfully utilized such a bellwether case management plan in the litigation of another mass tort case, that resulted in the settlement of all of the claims after the trial of the several bellwether plaintiffs' claims provided cross-sectional predictive value for the non-selected claims. Respondents relied on their counsel's citation[1] of that experience in requesting the TMI district court to adopt a bellwether approach.

Petitioners disagreed with Respondents' suggestion that the adoption of a bellwether approach would be useful. *Petitioners themselves acknowledged and argued that such*

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1. One of Respondents' counsel was lead counsel in a mass tort case involving the dioxin contamination of the Times Beach, Missouri community. Bellwether plaintiffs were selected for a trial in that case. After that trial, the remaining cases were resolved. Respondents' counsel provided a copy of the slip opinion to the TMI district court regarding the dioxin case experience which stated that "the theory is that such approach will give the parties a reasonable appraisal of the value of the remaining claims and result in settling them." *See Akers, et al. v. Syntex Agribusiness, et al.*, Cause No. 842-04887, etc. (Circuit Court of the City of St. Louis, State of Missouri) (slip opinion February 7, 1989).

an approach would not and could not have any binding effect on the thousands of remaining claims that would remain on the sidelines pending resolution of the bellwether claims. Petitioners argued that "[T]he 'test case' approach does not portend to resolve anything except the test cases selected." In other words, Petitioners acknowledged that the litigation of bellwether claims would not and could not be binding on the claims of the other plaintiffs, absent an agreement by the non-bellwether plaintiffs to that effect. No such agreement was ever reached, and clearly, Respondents' state of mind was that their claims would not be at issue during the litigation of the bellwether cases. Just as Petitioners recognized, Respondents believed their cases remained on the sideline during the litigation of the bellwether cases.

The district court rejected Petitioners' objection to the Respondents' case management proposal. The district court adopted Respondents' case management proposal with an acknowledgment that plaintiff-specific inquiries existed that would likely vary greatly among the many plaintiffs that would require *individual* consideration of each plaintiff's claim, and that the need for such individual consideration of each case precluded the adoption of a case management plan that would be akin to a class certification.

The district court adopted Respondents' case management plan *without modification or qualification*. That plan simply placed the claims of the selected bellwether plaintiffs at issue, without having any binding effect on the non-selected Respondents. Thereafter, as the discovery relevant to the claims of the bellwether plaintiffs was conducted, there was never any specific mention of the claims of the non-selected Respondents. There was no development of any particular facts relating to the claims of the 2,000

Respondents, as virtually none of them were deposed (other than a small number of same for the *limited* purpose of allowing the parties to make their selections of the bellwether plaintiffs) and limited documentary evidence was obtained with respect to any of them. The litigation was then conducted precisely the way envisioned by all plaintiffs, *i.e.*, the claims of bellwether plaintiffs were developed and discovered, utilizing their specific legal, factual and scientific theories that they chose to be applicable to their cases, with the claims of the remaining 2,000 plaintiffs' essentially stayed pending the outcome of the bellwether cases. And, contrary to Petitioners' contention, this is a fact, and not a misconceived perception held by Respondents.

Logically, Petitioners were as unwilling as the Respondents to concede that whatever was resolved in the litigation of the bellwether cases would also be binding against Petitioners or Respondents, for all cases. All parties wanted to reserve their rights on each and every claim. And, in the face of Petitioners' prior opposition to the class certification of a personal injury class, it was certainly reasonable to believe Petitioners themselves were not conceding a right to challenge each plaintiff's claim. During the course of all of the pretrial proceedings, no suggestion was ever made by Petitioners that the administrative consolidation of the cases in fact affected a substantive consolidation that would affect the rights of the non-bellwether plaintiffs.

Upon the conclusion of the pretrial proceedings involving the 10 bellwether plaintiffs' cases, Petitioners made an extensive attack pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) ("*Daubert*") on the admissibility of their expert evidence. The *Daubert* proceedings were fierce, and the outcome was far from certain.

However, once the district court made its *Daubert* exclusion rulings in favor of Petitioners with respect to the expert evidence proffered by the 10 bellwether plaintiffs[2] (which evidence Respondents would have sought to adopt subject to collateral estoppel and *res judicata* principles against Petitioners, but without a waiver to proffer additional evidence), Petitioners moved for summary judgment against the 10 bellwether plaintiffs. In a *footnote* to their memorandum in support of that motion, Petitioners suggested, almost as an afterthought, that if the district court were to grant summary judgment against the 10 bellwether plaintiffs, it could do so as to all of the remaining 2,000 plaintiffs' claims in the litigation. The footnote was the first time in the litigation that anyone had suggested that anything beyond the cases of the 10 bellwether plaintiffs were at issue under the terms of the case management plan proffered by the plaintiffs and adopted by the district court.

And, it certainly made sense that Petitioners would never have raised this absurd proposition any time earlier in the litigation of the 10 bellwether claims, because Petitioners

2. The 10 bellwether plaintiffs are the Petitioners in No. 99-1604 before the Court, wherein they seek review of the *Daubert* proceedings and rulings that resulted in the exclusion of the majority of those plaintiffs' expert evidence and the entry of summary judgment against them that was extended to Respondents. It is noteworthy that no TMI personal injury case has ever been tried, even after the passage of over 21 years since the accident occurred, not so much because of a rash of settlements, but because of the relentless maneuverings by Petitioners that have kept the cases tied up in legal procedural hurdles, and appeals. *See, e.g., In re TMI*, 193 F.3d 613, 623-29 (3d Cir. 1999) (discussing some of the procedural history of TMI litigation) [J. App. 12a-25a]. (Since the 10 bellwether plaintiffs also filed a Petition for a Writ of Certiorari, at No. 99-1604,a separate bound joint appendix ("J. App.") has been filed.)

wanted to preserve their right to argue that nothing that was litigated in those 10 cases would or could be binding against Petitioners with respect to the claims of the non-bellwether Respondents. Indeed, this type of protective philosophy has been the hallmark driving force behind most mass tort defendants' actions in opposing class certifications of personal injury cases, including even the certification of an "issues" class pursuant to Federal Rule of Civil Procedure 23(c)(4)(A). Obviously, Petitioners wanted to "hedge" against a *Daubert* ruling that might have gone against them to preserve an opportunity to argue that the evidence that may have been admitted against them in the bellwether cases was not *res judicata* against them as to the claims of the non-bellwether plaintiffs.

The *Daubert* exclusion rulings gave Petitioners the comfort and security they needed to take the bold step to argue that in spite of the limited nature of the administrative consolidation of the cases, all plaintiffs were now bound by the rulings in the bellwether cases. It certainly would be interesting to know whether Petitioners would have taken such a bold step if the *Daubert* rulings had gone against them, and whether they would have conceded that all plaintiffs were entitled to the benefits of such rulings. Respondents do not believe Petitioners would have agreed to such a result had the tables been turned, and their argument in support of summary judgment against all plaintiffs demonstrates a lack of candor, which the Third Circuit recognized.

Nevertheless, once the *Daubert* rulings went in favor of Petitioners, they cleverly proposed to the district court not only that all of the pretrial proceedings that had occurred in the 10 bellwether cases were always understood by all parties to be binding on all plaintiffs, but also that no plaintiff could

proffer any evidence, or legal or scientific theory, to support a case beyond the evidence and theories that was in the record for the cases of the 10 bellwether plaintiffs.

All plaintiffs opposed the motion for summary judgment. Specifically, Respondents made numerous arguments as to why summary judgment could not be entered against them, regardless of the state of the record with respect to the 10 bellwether plaintiffs. In summary, Respondents argued that the record established that only the 10 bellwether cases were at risk during the course of the pretrial proceedings, and that an *administrative* consolidation order could not affect the substantive rights of plaintiffs whose cases were not being actively litigated. Respondents argued that they had the right to present different proofs, experts and theories from those presented by the bellwether plaintiffs, and that this right was never waived and that no notice, such as a notice that would be equivalent to one that would be provided pursuant to Federal Rule of Civil Procedure 23, was ever given to Respondents to alert them that their rights were at risk by reason of an "administrative" consolidation. Further, Respondents argued that they were not bound by collateral estoppel principles to the proofs, theories and experts of the bellwether plaintiffs.

In essence, Respondents argued that because personal injury litigation involves highly individualized questions, including *inter alia*, the question of causation, each plaintiff is entitled to the development of the specific facts pertinent to each plaintiff's situation as part of the pretrial proceedings relating to each plaintiff's case. Plaintiffs argued that their claims could not be foreclosed by determinations made by the district court in litigation involving the claims of the 10 bellwether plaintiffs only.

In spite of Respondents' arguments, the district court fell victim to Petitioners' clever recharacterization of the scope and reach of the proceedings on the bellwether cases, and determined to extend its summary judgment determination against the 10 bellwether plaintiffs to the Respondents. In fact, the district court extended its summary judgment even to cases that had been consolidated as recently as only weeks after the filing of a complaint.[3]

On appeal to the Third Circuit, Respondents argued that summary judgment as to them had to be reversed because of numerous district court errors, including, *inter alia*: (1) its use of Federal Rule of Civil Procedure 42(a) to accomplish the equivalent of a class certification where no class had been certified and no notice had issued; (2) applying the equivalent of the doctrine of collateral estoppel to bar the claims of all of the non-bellwether plaintiffs where virtually no discovery had been taken in any of the cases, and none of those cases had any record upon which to access whether or not a genuine issue of material fact existed; (3) holding that defendants met their burden of establishing the existence of sufficient record evidence as to each of the non-bellwether plaintiffs' individual causation issues, where in fact no case specific evidence was developed by either party with respect

3. A group of plaintiffs filed a complaint on March 15, 1996. That case was "administratively" consolidated into the so-called master docket by the district court's Order entered on March 25, 1996. Petitioners answered the complaint on May 21, 1996 and these plaintiffs suffered summary judgment along with all other non-bellwether plaintiffs on June 7, 1996, 17 days later. The summary judgment occurred without any case specific litigation occurring. The entry of that summary judgment demonstrates the district court's sweeping interpretation of the administrative consolidation order, without any regard for the substantive rights of the plaintiffs, or the status of the record in any particular case.

to same, because the bellwether case management approach to the litigation did not result in the development of any case specific evidence for the non-bellwether plaintiffs' cases; and (4) that the non-bellwether plaintiffs were deprived of an opportunity to pursue their litigation through the development of their own evidence and scientific and legal theories. In essence, Respondents argued that their Seventh Amendment rights were denied.

The Third Circuit agreed that Respondents improperly suffered summary judgment and accordingly reversed the same. *In re TMI*, 193 F.3d at 723-727. [J. App. 257a-268a] The Third Circuit also rejected Petitioners' request for rehearing. [J. App. 682a-683a]

The Third Circuit determined that the primary inquiry should be on what effect an administrative consolidation of cases can have on the substantive rights of parties in a consolidated case. The Third Circuit noted that consolidation is only a matter of "convenience and economy in administration", citing *Johnson v. Manhattan R. Co.*, 289 U.S. 479, 497 (1933), and that "[c]onsolidation 'does not merge the suits into a single cause or change the rights of the parties, or make those who are parties in one suit parties in another'." *In Re TMI Litigation*, 193 F.3d 613, 724 (3d Cir. 1999). [J. App. 260a] The Third Circuit further concluded that a district court cannot properly extinguish substantive rights of plaintiffs merely because all of the cases had been consolidated. The Third Circuit recognized that a "test plaintiff" (*i.e.*, a bellwether) approach to a mass tort case preserves the rights of the non-participating, non-bellwether plaintiffs, whose claims are truly not at issue during the pretrial litigation of the claims of the bellwether plaintiffs. Further, the Third Circuit relied upon Federal Rule

of Civil Procedure 42(b), and emphasized the preservation of the right of trial by jury. *Id.* at 725. [J. App. 263a]

Finally, the Third Circuit also concluded that the extension of summary judgment to the claims of the non-bellwether plaintiffs improperly extended the doctrine of collateral estoppel/issue preclusion, citing *DeLuca v. Merrill Dow Pharmaceuticals, Inc.*, 911 F.2d 941 (3d Cir. 1990) for the proposition that:

> [W]e do not have the authority to create special rules to address the problems posed by continued Bendectin litigation. Principles of issue preclusion have not developed to the point where we may bind plaintiffs by the finding of previous proceedings in which they were not parties, even by a proceeding as thorough as the multidistrict common issues trial. *Id.* at 952.

Id. at 726. [J. App. 264a-265a]

Thus, the facts recited by Petitioners are incomplete and misrepresent the state of the record in at least the following respects:

1. Petitioners imply that the trial court consolidation consolidated all plaintiffs' claims for all purposes, and drew bright line deadlines for the completion of all fact and expert discovery for all plaintiffs' cases. *See* Petition at Question Presented, and at 4, ¶4. This is untrue and misleading, in that virtually no facts were developed for any of the non-bellwether plaintiffs' cases, and no case specific expert evidence was submitted by either *Petitioners* or Respondents relative to the individual issues relating to the causation of

their personal injures. This is so, because during the pretrial litigation of the bellwether cases, before the *Daubert* rulings, Petitioners themselves truly recognized that only the bellwether cases were at issue, and Respondents' cases were essentially stayed.

2. Petitioners' statement that the expert evidence that the district court excluded pursuant to its *Daubert* rulings defined and delimited the extent of any expert evidence and legal and scientific theories that could be pursued by the non-bellwether plaintiffs is wrong. *See* Petition at Question Presented, and at 5. While the non-bellwether plaintiffs certainly would have sought to take advantage of the expert evidence proffered by the bellwether plaintiffs, they neither consented to nor agreed that the scope of the expert evidence upon which they could or would rely was limited to the expert evidence and the legal and scientific theories being pursued by the bellwether plaintiffs.

3. Petitioners' statement that the stipulation of counsel for the dismissal of the multiplicity of different civil actions affected an agreement that every plaintiff in every action was thereafter to be treated as a plaintiff in one consolidated action for substantive purposes is wrong. *See* Petition at 4, ¶2. This statement incorrectly implies that the non-bellwether plaintiffs agreed that their substantive rights would be affected by the consolidation. However, they never expressed any agreement that the litigation of the individual bellwether claims would be binding on them.

4. Petitioners' argument that the protocol that was allegedly established to differentiate between pleadings applicable to all plaintiffs, and pleadings applicable to just a few plaintiffs, demonstrated a conscious willingness on the

part of the Respondents to waive their individual rights, is misleading. *See* Petition at 4, ¶3. The protocol was not uniformly followed by either of the parties or by the district court. In other words, there were instances where an "All Plaintiff" caption was used where the substance of the pleading clearly applied to only one or several plaintiffs, but not all. In any event, substantive rights cannot be extinguished simply by a form over substance argument that works to the severe detriment to the substantive rights of the non-bellwether plaintiffs.

5. The statement that the district court established deadlines applicable to all plaintiffs for discovery, including the submission of expert reports pursuant to Federal Rule of Civil Procedure 26(a)(2), is wrong. *See* Petition at 4, ¶4. No deadlines at all were established to govern any of the discovery for the non-bellwether plaintiffs, and in fact, no discovery and no causation reports for the non-bellwether plaintiffs were submitted by *either* party during the course of the pretrial litigation of the bellwether plaintiffs' cases.

6. Petitioners' statement that the district court in effect "severed" for trial the claims of the bellwether plaintiffs while in all other respects the litigation proceeded as a single consolidated case is untrue. *See* Petition at 4, ¶5. No order of severance was ever entered, and no order was ever entered that amended the order accomplishing the *administrative* consolidation of the cases so as to place the non-bellwether plaintiffs on notice that their substantive rights might be impacted by the proceedings involving the bellwether cases. Indeed, there was no concurrent litigation of the non-bellwether cases while the bellwether cases were being prepared for trial. The non-bellwether cases were left on the sideline by all parties, consistent with the true scope, purpose

and meaning of the administrative consolidation and plaintiffs' case management plan adopted by the district court.

7. Petitioners unfairly imply that *all* plaintiffs adopted a causation theory that the bellwether plaintiffs chose to pursue. (The bellwether plaintiffs presumed they each received a dose of 10 rems or more of radiation, and that such a dose more likely than not caused their cancers or neoplasms.) *See* Petition at 5. This unfairly implies that all plaintiffs accepted the theory that a minimum dose of 10 rems was the threshold needed to establish medical causation in each of their cases. The non-bellwether plaintiffs never acknowledged a minimum 10 rem threshold dose theory and the medical causation expert reports proffered by the 10 bellwether plaintiffs pertained only to the specific cases of the bellwether plaintiffs, the only cases at issue.

8. Petitioners' statement that the causation expert opinions were expressly contingent on proof that each plaintiff had received a dose of 10 rems or more unfairly implies that all non-bellwether plaintiffs accepted a minimum 10 rem dose as a threshold. *Id.* However, none of the causation reports proffered by the bellwether plaintiffs pertained to or even discussed the circumstances of any of the non-bellwether Respondents' claims. In fact, even Petitioners' causation experts did not specifically address the non-bellwether plaintiffs' claims in their reports. The non-bellwether claims simply were not at issue.

9. Petitioners' statement that Respondents did not interpose an affidavit pursuant to Federal Rule of Civil Procedure 56(f), stating what additional affidavits or discovery Respondents needed to oppose the motion for

summary judgment, is misleading. *Id.* This statement incorrectly presupposes that the non-bellwether plaintiffs were parties to the pretrial proceedings, which they were not. The non-bellwether plaintiffs' claims were not at issue, as their claims were only administratively consolidated. Of equal importance, Petitioners did not proffer any plaintiff specific expert evidence addressed to any one of the approximately 2,000 non-bellwether plaintiffs' cases to demonstrate that they even had a right to summary judgment against them. No basis for the summary judgment request against the non-bellwether plaintiffs existed in the record. It was nothing more than a fabrication of Petitioners, founded on a recharacterization of the scope and reach of the consolidation, made only after the district court's *Daubert* rulings. Thus, there was no need for a Rule 56(f) affidavit.

* * * *

The true essence of Petitioners' motion for summary judgment was that they were entitled to such relief against the 10 bellwether plaintiffs because the expert evidence proffered by those plaintiffs to establish that each one had been exposed to a minimum dose of 10 rems of radiation or more had essentially been *Daubert* excluded, and that as a result of the exclusion of such evidence, the case specific medical causation reports that they proffered that were premised on an assumption of 10 rem exposure necessarily had to fail for a lack of foundational evidence. However, Petitioners then tried to extend this reasoning to the non-bellwether plaintiffs' claims. But, no record existed in the trial court that establishes that the non-bellwether plaintiffs agreed to a 10 rem threshold burden, and in opposing the "footnote" request for summary judgment, they presented evidence that established the existence of other legal and

scientific theories that would permit their cases to be litigated irrespective of the exclusion of certain expert evidence proffered by the 10 bellwether plaintiffs. For example, the non-bellwether plaintiffs presented evidence that the scientific community recognizes that there is no safe threshold for exposure to radiation and the resulting induction of cancer. In fact, even though the district court rejected that argument, the Third Circuit credited it, in reversing the summary judgment against the Respondents. *See In re TMI*, 193 F.3d at 726-727. [J. App. 265a-268a]

Accordingly, the decision of the Third Circuit to reverse the summary judgment granted by the district court against the non-bellwether plaintiffs was eminently correct. The decision to reverse was well supported by the state of the record and the legal principles that preclude the entry of summary judgment in inappropriate circumstances.

REASONS FOR DENYING THE WRIT

A. The Court Should Not Grant Review Because The Third Circuit's Determination To Reverse The Entry Of Summary Judgment Was Consistent With The Record Below, In Spite Of Petitioners' Attempts To Persuade The Court That A Grave Departure From The Accepted And Usual Course Of Judicial Proceedings Has Occurred

Petitioners strenuously argue that what occurred in the Third Circuit in the nature of the reversal of summary judgment was unique and must not be allowed to stand as precedent that may allow plaintiffs and their counsel to exercise a veto power over the ability of a district court to entertain a summary judgment motion. Petitioners are simply

incorrect that the Third Circuit decision represents any departure from the accepted and usual course of judicial proceedings. All that the Third Circuit did was to reverse an improvidently granted summary judgment that the district court was duped into granting on the basis of Petitioners' clever recharacterization of the status of the record.

Contrary to Petitioners' argument, other courts presiding over mass tort litigation have been careful to recognize the individual nature of personal injury claims. This philosophy derives from the fact that each individual plaintiff has a unique exposure history, and medical and familial background. The presence of that fact has resulted in the frequent determination that individual questions predominate in mass tort personal injury cases. In the absence of a truly predominating and dispositive common issue that possibly could resolve litigation based on a question of law and not on the facts, procedural devices cannot be utilized to deprive plaintiffs of substantive rights.[4]

4. In mass tort litigation, because of the usual absence of a predominating common question, the cases generally are not susceptible to class certification nor resolution on a mass basis, unless a single determinative legal issue, such as preemption is present. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (question of whether independent cause of action preempted by Medical Device Amendments of 1976, 21 U.S.C. § 360(K) — where preemption is found, independent or private cause of action precluded — case therefore capable of determination on basis of question of law without regard to case specific facts). In mass tort personal injury litigation where no single legally determinative issue such as preemption is applicable, the claims of the plaintiffs are driven by their individual facts. In *TMI* litigation, Petitioners lost the only possible issue that may have been legally determinative as to the claims of all plaintiffs, *i.e.*, the question of whether or not they breached their duty of care. *See In re TMI*, 67 F.3d 1103 (3d Cir. 1995), *cert denied*, 516 U.S. 1154 (1996) (holding that defendants had breached their duty of care owed to all plaintiffs).

The petition for writ of certiorari therefore, should not be granted because this case raises no compelling issue that would warrant review by this Court. This is so in spite of Petitioners' attempt to shoehorn the facts of this case into an argument that the Third Circuit's decision "gives plaintiffs' counsel a right to veto the Federal Rules of Civil Procedure, if they choose, [thereby presenting] such a departure from the 'accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power.' S.Ct. R. 10 (a)." Petition at 10. For the most part, Petitioners' asserted reasons for review are based on their misleading and incomplete recitation of the record below and their flawed attempt to demonstrate that the Third Circuit improperly applied settled rules of law to the facts and issues.

Nowhere did the Third Circuit effectively revoke Rule 56, as argued by Petitioners. In fact, the Third Circuit's opinion specifically acknowledges the usefulness of the summary judgment device in appropriate cases. The Third Circuit stated:

> Summary judgment does not violate a party's Seventh Amendment jury trial rights so long as the person having the right to a jury trial is an actual participant in the summary judgment proceeding. *See City of Chanute, Kansas v. Williams Natural Gas Co.*, 955 F.2d 641, 657 (10th Cir. 1992) ("[S]ummary judgment, applied properly, does not violate the Seventh Amendment.") (citing *Fidelity & Deposit Co. v. United States ex rel. Smoot*, 187 U.S. 315, 319-21, 23 S.Ct. 120, 47 L.Ed. 194 (1902)). However, absent a positive manifestation of agreement by

> Non-Trial Plaintiffs, we cannot conclude that their Seventh Amendment right is not compromised by extending a summary judgment against the Trial Plaintiffs to the non-participating, non-trial plaintiff. In fact, a Seventh Amendment argument was made in the district court, but the argument was summarily dismissed. 927 F. Supp. at 838 n. 7.

In re TMI Litigation, 193 F.3d at 725. [J. App. 263a-264a] The spin that Petitioners place on these statements by the Third Circuit, in an attempt to bolster their argument that Rule 56 has been revoked by the Third Circuit opinion, is that summary judgment cannot be entered against a party unless the party expresses positive agreement to submit to the summary judgment proceedings. This is not what the Third Circuit held, and accordingly, no departure from the "accepted and usual course of judicial proceedings" occurred. In fact, the Third Circuit *affirmed* the entry of summary judgment against the bellwether plaintiffs.

The only fair interpretation of the Third Circuit's holding is that summary judgment cannot be entered against a party who is not a participant to the proceedings leading to the summary judgment motion. This proposition is not astonishing. In fact, this is the hallmark for the notice requirement that exists in Federal Rule of Civil Procedure 23. If a party is to be bound by legal proceedings that can potentially affect that party's substantive rights, the party is fairly entitled to know that the proceedings may have that impact, so that the party can adequately protect his or her interests. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

The record in this case clearly reflected that the non-bellwether plaintiffs had not been placed on any fair notice that their claims were being litigated at the same time as the litigation of the bellwether cases. No case specific discovery was taken from the non-bellwether plaintiffs, no case specific expert evidence was submitted by *either* party as to those claims, and the cases were essentially stayed awaiting the outcome of the bellwether cases. This is the only fair interpretation of the record below, based on, *inter alia*, the language of the administrative consolidation, the district court's adoption of the plaintiffs' case management plan, and the parties' conduct of the litigation, *i.e.*, with no development of any record relating to the claims of the non-bellwether plaintiffs.

Petitioners' splicing together of tiny pieces of the enormous record in this case, such as the captions of court filings and isolated statements made by counsel, in an effort to create a false impression that each of the nearly 2,000 non-bellwether plaintiffs expressly agreed to be bound by the entirety of the outcome of the bellwether plaintiffs' claims, simply defies the logic of the adoption of a bellwether case management procedure.

B. The Court Should Not Grant Review For The Purpose Of Articulating New Judicial Law That Would Authorize Lower Courts To Compromise Substantive Rights For The Sake Of Decreasing Docket Pressure

Petitioners' last gasp argument in support of Court review is that in the absence of such review, courts will be denied access to the efficiency-enhancing procedural devices that are intended to be available to them for clearing crowded dockets. Petition at 11. However, judicial efficiency cannot

be purchased at the expense of substantive rights. *See Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) ("[t]he benefits of efficiency can never be purchased at the cost of fairness"). *See also Arnold v. Eastern Airline, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983) (*en banc*), *cert denied*, 464 U.S. 1040 (1984); *C. Wright & A. Miller*, Federal Practice & Procedure: Civil 2d § 2383. pp. 440-42 (1995).

Indeed, as noted by the Second Circuit in *In re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831, 853 (2d Cir. 1992), "the systematic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's — and defendant's — cause not be lost in a shadow of a towering mass litigation." Thus, in *Cimino v. Raymark Industries, Inc.*, 151 F.3d at 311-321, the Fifth Circuit discussed at length the burden placed on the courts by mass tort litigation, but held steadfast to protect the Seventh Amendment right. The Fifth Circuit also refused to abridge that right on the basis of a Fed. R. Civ. P. 42(a) consolidation.

Crowded court dockets cannot and should never be the justification for abridging individual substantive rights. Indeed, this Court has twice rejected even class action approaches for the clearing of crowded court dockets of cases arising out of the asbestos mass tort experience. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

CONCLUSION

For the reasons given above, the Petition should be denied.

Respectfully submitted,

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